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ments are duplicates would seem to be whether there is substantial certainty of identity among them. If so, they should be allowed to be introduced as primary evidence.

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AGREEMENTS IN RESTRAINT OF TRADE BY COPYRIGHT-HOLDERS AND PATENTEES. — "To promote the progress of science and useful arts," Congress, under powers conferred by the Constitution,<sup>1</sup> has secured to authors and inventors by means of copyrights and patents the exclusive right to produce and "to vend" their writings and discoveries.<sup>2</sup> This statutory right of monopoly seems naturally to carry with it the right to employ ordinary and reasonable means of enforcing the monopoly. Thus, a copyright-holder or patentee is allowed to make such contracts with the vendee of the protected article as he wishes. Stipulations, for instance, that the vendee shall sell only for a fixed price or under certain conditions have been held valid, and the breach of them enjoined.<sup>3</sup> Yet beyond the strict scope of this statutory exemption it seems clear that the holders of copyrights and patents should be bound by the same common law and statutory restrictions upon contracts and combinations in restraint of trade as are the owners of other property. The test is whether or not the acts in question tend toward the establishment of a new monopoly. Obviously, it would seem that a new monopoly is being attempted when the holders of separate copyrights or patents on articles of the same general class combine for the purpose of controlling the market in the general class of commodities, the particular varieties of which are the subjects of the separate copyrights or patents. The Court of Appeals of New York has, nevertheless, intimated an opinion that a combination among publishers of copyrighted books to boycott all jobbers and booksellers who should not maintain the net prices of copyrighted books fixed by the individual members of the combination, is not illegal as being in restraint of trade.<sup>4</sup> More recently, however, a federal court strongly maintained the contrary view. *Bobbs-Merrill Co. v. Straus*, 139 Fed. Rep. 155. (Circ. Ct., S. D. N. Y.)

The position taken by the federal court seems eminently sound. The copyright and patent laws confer a monopoly as respects the property covered by them; but it seems unreasonable to construe them as conferring on the owners of several distinct copyrights or patents a right to combine to restrain competition and trade.<sup>5</sup> Such combinations are, from the public standpoint, especially undesirable. In general, it is only the competition between different copyrighted and patented commodities substantially subserving the same general want that has made copyright and patent laws tolerable. The monopoly price of the protected articles is kept down by this sort of imperfect competition; this competition withdrawn, the prices would rise from those at which people would do without that particular commodity to those at which they would do without that class of commodities.

The question as to the illegality of such combinations or agreements must, however, be carefully distinguished from the question as to the effects

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<sup>1</sup> U. S. Const. Art. I, § 8, clause 8.

<sup>2</sup> 26 U. S. Stats. at L. 1106; 16 *ibid.* 201.

<sup>3</sup> *Garst v. Harris*, 177 Mass. 72; *Fowle v. Park*, 131 U. S. 88.

<sup>4</sup> *Straus et al. v. Am. Pub. Assn.*, 177 N. Y. 473. Cf. *Park & Sons Co. v. Nat.*, etc., Assn., 175 N. Y. 1.

<sup>5</sup> *National Harrow Co. v. Hench*, 83 Fed. Rep. 36, 38.

of the illegality. The illegality of a combination or agreement of copyright-holders and patentees taints the transactions of the combination and its members just so far and only so far as it would, were the property involved not the subject of patents and copyrights.<sup>6</sup> Thus a contract licensing the sale of a patented article, made in direct pursuance of the unlawful objects of an illegal combination is held unenforceable.<sup>7</sup> On the other hand, in a suit brought by the owner for the infringement of a copyright or patent, it is no defence that the plaintiff is an illegal combination or a member of it.<sup>8</sup>

ESTOPPEL AGAINST STATE AND UNITED STATES. — At common law and in some of our states, estoppel could not be set up against the sovereign.<sup>1</sup> It is now clear, however, that estoppel by record applies to the state or federal government. Thus, when a state recovered judgment for taxes due during certain years, it was estopped in another action to recover an alleged balance for the same years.<sup>2</sup> By the weight of authority, also, estoppel by deed may be set up against the government. Thus, where a state, for valuable consideration, granted land to an alien, his heirs and assigns, with warranty, it was estopped to set up the alienage of the grantee or of his heirs as ground of an escheat.<sup>3</sup> Estoppel *in pais*, or equitable estoppel, against the government, however, has not in general met with favor among the states.<sup>4</sup> In support of the prevailing view, courts find an analogy in the rules exempting the state from the operation of the statute of limitations and from the doctrine of laches. But the government is here exempt not from any notion of extraordinary prerogative, but for reasons of public policy. Since the fiscal transactions of the government are so numerous and its agents so scattered, it is apprehended that the utmost diligence on the part of the government might not save the people from loss through outlawed claims. Estoppel *in pais*, however, rests on principles of universal justice. "When matter of estoppel arises, the observance of honest dealing may become of higher importance than the preservation of the public domain."<sup>5</sup> When the government engages in commercial transactions, it is subject to the same laws that govern individuals. Thus, when it becomes a party to negotiable paper, it has the rights and assumes the liabilities of individuals in a similar position, except that it cannot be sued.<sup>6</sup> There seems, therefore, no good reason why the government should not be estopped, like an individual.<sup>7</sup>

<sup>6</sup> 1 Page, Contracts 698. See *Strait v. National Harrow Co.*, 51 Fed. Rep. 819, 820.

<sup>7</sup> *National Harrow Co. v. Hensch*, 76 Fed. Rep. 667; affirmed in 83 Fed. Rep. 36. Cf. *Gamewell, etc., Co. v. Crane*, 160 Mass. 50; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.

<sup>8</sup> *Edison, etc., Co. v. Sawyer-Iman, etc., Co.*, 53 Fed. Rep. 592; *American, etc., Co. v. Green*, 69 Fed. Rep. 333; *General Electric Co. v. Wise*, 119 Fed. Rep. 922. But see *contra*, *National Harrow Co. v. Quick*, 67 Fed. Rep. 130.

<sup>1</sup> See *Queen v. Delme*, 10 Mod. 199, 200; *Taylor v. Shufford*, 4 Hawks (N. C.) 116, 132; *State v. Williams*, 94 N. C. 891, 895.

<sup>2</sup> *Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 716. See also *Fendall v. United States*, 14 Ct. of Cl. 247.

<sup>3</sup> *Commonwealth v. André*, 3 Pick. (Mass.) 224.

<sup>4</sup> See *People v. Brown*, 67 Ill. 435.

<sup>5</sup> *United States v. Willamette Val. & C. M. Wagon-Road Co.*, 54 Fed. Rep. 807, 811.

<sup>6</sup> *United States v. Bank of Metropolis*, 15 Pet. (U. S.) 377, 392; *United States v. Barker*, 12 Wheat. (U. S.) 559.

<sup>7</sup> See *United States v. Stinson*, 125 Fed. Rep. 907; *State v. Flint & P. M. R. R.*, 89 Mich. 481; *State v. Milk*, 11 Fed. Rep. 389.